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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1975

No. 75-1532

JOHN HECHINGER, *et al.*, *Appellants*,

v.

DR. ROBERT MARTIN, CHAIRMAN, DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, *et al.*, *Appellees*.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

INTRODUCTION

This Court, the Congress and state legislatures have traditionally refrained from meddling with the purely political process by which elected representatives are chosen in this country, except to insure the basic freedom of choice and substantial equality of voters. By enacting the statute which is in controversy in this case, Congress has embarked on an historic new venture. It has, for the first time in history, dictated in advance and by its own fiat the political makeup of a significant portion of an ostensibly elected body, the

District of Columbia Council, thereby denying the right of citizens within the District to express their political consciences and to elect their own representatives for this segment of their local legislature. This same statute, if unchecked by this Court, constitutes an open license for any state legislature in the land to fix in advance the representation of each political party in ostensibly elected local legislative bodies (such as City Councils and County Commissions), thus invading by legislative decree a domain in our polity that has been preserved to each voter's conscience.

In addition, for the first time, this Court is asked to review an Act of Congress which discriminates against all voters holding partisan political beliefs, denying them seats in a local legislature, while freeing those who do *not* hold partisan political belief (Independents) from any such loss of representation.[1]

By this enactment Congress has ventured full tilt into dictating who may and who may not represent voters in the voters' own legislature; disqualifications dictated in advance and based solely on the political belief of certain candidates.

This Appeal seeks review of this constitutional Pandora's box, which in its obvious significance, has no limits.

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[1] The states, too, qualify voters by residence and age. The point of this Court's recent apportionment decisions is that this must be even-handed and non-discriminatory.

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Columbia (sitting as a three-judge court) entered on March 24, 1976, denying Appellants' Motion for Preliminary and Permanent Injunction against enforcement by the Defendant Board (appellee in this Court) of Sections 401(b)(2) and 401(d)(3) of the District of Columbia Self-Government and Governmental Reorganization Act (known popularly and referred to hereinafter as the "D.C. Home Rule Act":) and granting Summary Judgment to Appellees. This is an Appeal brought to this Court under Section 1253 of Title 28 (U.S.C.) from the determination of a three-judge court convened to adjudicate the constitutionality of the cited provisions of the District Home Rule Act. Pursuant to statute, this cause is before the Supreme Court on its merits.

OPINION BELOW

The opinion of the three-judge court is not reported. Copies of the opinion are attached to this Statement as Appendix A.

JURISDICTION

This suit was brought under Sections 2201, 2202, 2282 and 2284 of Title 28 (U.S.C.). It seeks declaratory judgment declaring the voter-restriction provisions (cited hereinabove) of the District of Columbia Home Rule Act unconstitutional, and preliminary and permanent injunctions against their enforcement by the Defendant Board, appellee herein. On February 20, 1975, the cause was certified by U.S. District Judge William Bryant to the Chief Judge of the Circuit (pursuant to Section 2284 of Title 28, U.S.C.) and the Chief Judge, as required by the statute, convened

a three-judge panel on February 24, 1975. The cause was then briefed before this panel, argued and submitted on October 8, 1975. On March 24, 1976 the three-judge panel entered its decision, which is attached as Appendix A. The appeal to this Court is taken, as noted, pursuant to Section 1253 of Title 28 (U.S.C.).
Notice of Appeal filed in the U.S. District Court on April 23, 1976

QUESTIONS PRESENTED

(1) Do Sections 401(b)(2) and 401(d)(3) of the D.C. Home Rule Act infringe on rights of the appellants to vote their political beliefs for their elected representatives, as these rights are guaranteed by the First Amendment?

(2) Do the same sections deny to these appellants equal protection of the laws in that the restrictions (against electing representatives of their political choice) found in these sections apply only to voters who profess partisan political belief (such as appellants), and do not apply to voters who do not profess partisan political belief, viz., independants: does such denial, accordingly, violate appellants' rights under the Fifth Amendment.

(3) Do the same sections deny to these appellants equal protection of the laws by apportioning to them representation in their legislature far lesser than their numbers, violating this Court's one-man, one-vote principle.

STATUTES INVOLVED

Sections 401(b)(2) and 401 (d)(3) of the District of Columbia Home Rule Act are set forth, *infra*, p. 5-6.

STATEMENT OF FACTS

A. The Statute

Under the District of Columbia Self-Government and Governmental Reorganization Act ("the Act")[2] the 93rd Congress created an elective Council of the District of Columbia. The Council is made up of 13 members, one of whom (separately elected at large) is the Chairman. Of the remaining 12, eight are elected from wards in the District. Four are elected at large. The Council will possess the "legislative power granted to the District . . ."[3] and this power includes the power of setting the fiscal budget for the District as well as other major legislative functions.

The following restriction was placed by Section 401(b)(2) of the Act on the election of at large members of the Council:

> "In the case of the first election held for the office of member of the Council after the effective date of this title, not more than two of the at large members (excluding the Chairman) shall be nominated by the same political party. Thereafter, a political party may nominate a number of candidates for the office of at large member of the Council equal to one less than the total

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[2] Public Law 93-198 (87 Stat. 744), signed into law by the President on December 24, 1973; approved by a majority of the voters of the District of Columbia by Referendum on May 7, 1974. This referendum was of the entire D.C. Home Rule Act as a package. No item veto was allowed. It was Home Rule under this Act or no home rule at all.

[3] Section 414(a).

number of at large members (excluding the Chairman) to be elected in such election." (Emphasis supplied.[4]).

The following further restriction was placed by Section 401(d)(3) of the Act on at large members of the Council:

> "Notwithstanding any other provisions of this section, at no time shall there be more than three members (including the Chairman) serving at large on the Council who are affiliated with the same political party."

B: Registration

Under the election laws of the District of Columbia the Defendant Board is authorized and directed to maintain a registry of qualified voters within the District of Columbia. Such registration includes the party affiliation of each qualified voter or the fact that the registered voter is not affiliated with a party. As of the date of this Jurisdictional Statement the following are the most recent totals[5] of qualified voters within the District of Columbia affiliated with each political party or unaffiliated with any party:

(a) Democratic Party 208,566 (or 76.55% of the qualified voters)

[4] The sentence of the provision under scrutiny in this suit, together with 401(d)(3), quoted immediately thereafter.

[5] Appellee Board's most recent figures, which are for March of 1975.

(b) Republican Party 31,392 (or 11.52% of the qualified voters)

(c) Statehood Party 1,515 (or .55% of the qualified voters)

(d) Other Parties 690 (or .25% of the qualified voters)

(e) Independent or unaffiliated qualified voters 30,288 (or 11.11% of the qualified voters)

C: The Primary of Election of September 10, 1974

Under Section 751 of the Act, each of the three Parties within the District of Columbia qualified (Under Section 751(e) of the Act) to hold a primary election did so on September 10, 1974. The Parties qualified by past polling records, are the Democratic, Republican and Statehood Parties. In this primary election, the following individuals received the following votes:

(a) Democratic Party primary:

Marion Barry	35,065
Rev. Douglas Moore	25,598
Delano Lewis	22,122
Ruth Hankins-Nesbitt	20,836

(Others received smaller numbers not herein relevant.)

(b) Republican Party primary:

Rev. Jerry Moore	4,481
Rockwell Foster	4,066
Melvin Burton	3,653

(c) Statehood Party: Since there were only two candidates on the Statehood Ballot, both were certified by the Board as having been elected candidates.

Pursuant to the provisions of Section 401(b)(2) the Defendant Board certified as successful candidates the following individuals from the above list, thereby placing them on the ballot for the General Election to be held on November 5, 1974:

Democrats:	Marion Barry Rev. Douglas Moore
Republicans:	Rev. Jerry Moore Rockwell Foster
Statehood:	Julius Hobson, Sr. Josephine Butler

D: General Election of November 5, 1974[6]

On November 5, 1974 the General Election was held in the District of Columbia. In it the following were elected with the following votes (as certified by the Certificates of Election filed by the Defendant Board):

Douglas E. Moore	55,928 votes
Marion Barry	55,615 votes
Julius W. Hobson	48,708 votes
Jerry A. Moore, Jr.	35,297 votes

[6] Two of the present appellants brought this same action just prior to the 1974 election but were held to be, by a separate three-judge panel, too late for the Court to do anything about that election. That Court specifically stated that its determination was without prejudice to a future suit. The present suit was then filed after the 1974 election.

Prior to being seated as Councilmen at large, the four individuals who were elected drew lots to determine who would hold two-year terms, and who would hold four-year terms. Marion Barry and Jerry Moore, Jr., drew the two-year terms, which will terminate in the next general election in the District, to be held in November of 1976. Douglas Moore and Julius Hobson drew four-year terms, which will terminate in the general election in the District to be held in November of 1978.

E: The Statute and the November 1976 Election

This suit was filed on November 15, 1974. By Stipulation, and with the approval of the Court, briefing was completed in September, 1975 so that a final determination of the controversy could be secured well in advance of the November, 1976 election. The cause was argued before the three-judge panel on October 8, 1975. It rendered its decision on March 24, 1976.

Accordingly, unless changed by Order of this Court, in the general election of November 1976 the Democratic, Republican and Statehood Parties will, pursuant to Section 401 (b)(2) of the Act, each be permitted to nominate but one candidate for the two at large seats to be filled. In that same election, however, both seats may be filled by Independents. It is that provision, and the continuing operation of Section 401(d)(3) that this lawsuit seeks to test.

F: Proceedings below:

Appellants, Plaintiffs below, make three contentions in this suit. First, that as registered Democrats they have been denied voting and associational rights protected under the First Amendment when they were denied (by the contested statutory provisions) the right to vote for 50% of the

at large councilmen in the District of Columbia Council.[7] Second, that as members of a political party they were improperly discriminated against by these same provisions, which exempted independents from their restrictions, permitting independents to fill all four Council seats whereas members of a political party are permitted to fill only two. Third, as registered Democrats making up 76.55% of the registered voters of the District of Columbia, these appellants were similarly denied equal protection by being restricted to access to but 50% of the Council's at large seats on the ballot. The latter two contentions were made under the Fifth Amendment.

The Court below, after its consideration of the cause from October 8, 1975 to March 24, 1976, granted Defendants' and Intervenors' Motions for Summary Judgment, denying Plaintiffs (appellants herein) prayers for relief. The Court held that the First Amendment interferences argued by the Plaintiffs were justified by "Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capital", and that the means chosen by Congress were reasonable. The panel held that past cases supported this view, primarily *Blaikie v. Power*, 13 N.Y. Ed. 134, 193 N.E.2d 55 (1963), appeal dismissed at 375 U.S. 439 (1964); *Buckley, et al. v. Valeo, Secretary of U.S. Senate, et al.*, 44 LW 4127 (January 30,

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[7] Section 401(b)(3) limited each party to no more than 2 of the four at large seats on the first Council and limits each party to no more than one of the 2 seats to be filled in the 1976 election. Section 401(d)(3) includes the Chairman also selected at large, limiting each party to no more than three representatives elected at large, including the Chairman. Thus Democrats have been denied access to 50% of the at large seats in the Council by 401(b)(2) – two seats of four – and 40% of the total. Neither of these restrictions apply to Independents, who can fill all 5 at large seats, including the two to be filled in the 1976 election.

1976) and *Gaffney v. Cummings*, 412 U.S. 735 (1973). The panel further held that "no discrimination of Fifth Amendment problem is apparent" in the voting scheme made up of the contested statutes.

G: Opinion below: The Opinion below is attached to this Jurisdictional Statement as Appendix A.

THE QUESTIONS ARE SUBSTANTIAL

(A): The rights of appellants are protected by the First and Fifth Amendments and have been for over 100 years.

Among those freedoms preserved traditionally by this Court from state-imposed inhibitions is the free and unfettered exercise of the individual franchise. Beginning with Civil Rights legislation passed at the close of the Civil War, extending through this Court's successful clearing of the vast snarl of state-imposed apportionment inequities in the 1960's and 1970's, and extending to this Court's most recent decisions, freedom from state interference with the individual's free exercise of his political rights in elections has been accorded as high a place as any protected right of American citizenship. This First Amendment protection has been matched by the Court's concern for the substantial equality of each voter's exercise of his political preferences; this protection has been accorded under the Fifth Amendment.

The legislation tested in this case flies straight into the face of both policies of this Court, and does so with no warrant from any of this Court's past decisions or opinions.

There is no need to delineate the last century's constitutional developments in defense of the unfettered right to vote. Nor is there any need to repeat this century's reassurance of this right in the Voting Rights Act of 1965. These are guarantees of the right to express First Amendment preferences, not in some elections, for some offices, with other elections and elective offices excluded from the guaranty. These are landmark guarantees of the right to vote in *all* elections in which elective offices are being filled.

More recently this Court has reiterated the same guarantees. In 1968 this Court stated in Williams v. Rhodes, when the American Independent Party and Socialist Worker candidates were denied access to the Ohio ballot:

> "393 U.S. 23, at 30: "in the present situation the state law places burdens on two different, although overlapping, kinds of rights – the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment, . . . Similarly we have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

This same concern that the right of political expression remain impervious to interference was voiced again just 15 months ago in *Cousins v. Wigoda,* 419 U.S. 477 (1975). Illinois state law was there held by its highest court to supervene in the election of national convention delegates. But this Court held that party activity embraced under its constitutional protection the right to fix convention seating rules. The nature of constitutional protection of political activity was defined:

> 479 U.S. at 603: "There can no longer by any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and 14th Amendments . . . the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."

As shall be demonstrated below, no decision of this Court has ever sanctioned a direct violation of this freedom in the form of a state prohibition against voting for a party's candidates for designated legislative offices.

(B): Whatever limitations there are on First Amendmends rights (if such limitations exist) do not justify a denial of the right of each voter to express his political preference for his representative in his legislature.

(1) *No presumption of constitutional rectitude is accorded state interference with voting rights:* It is the thrust of this Jurisdictional Statement that Congress has pitched

every state legislature and all of our Courts into the business of manipulating voting rights, an activity improper for both. In *Hechinger*, half[8] of the at large seats in the legislature created by Congress for the District of Columbia are excluded by statute from the free participation of the District electors. This kind of statute is entitled to no presumption of constitutionality. This Court, in *Kramer v. Union School District* spoke directly to this point:

> 395 U.S. at 627: "And, for these reasons, the deference usually to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable."

Where First Amendment restrictions to an entire class of voters are present (as they are to all Democrats within the District of Columbia under this statute), the presumption goes the other way:

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[8] In the 1976 election and under Section 401(b)(2); as shown *supra*, the exclusion under Section 401(d)(3) covers 2 of the 5 representatives elected at large, or 40%.

> "But as a general matter, before the right (to vote) can be restricted the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The Court below has chosen to assert in this case that:

> "Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capital is a valid one, sufficiently important to warrant the challenged interference with the rights of political association." (Slip opinion, p. 5)

But it is clear that the mere *recital* by Congress of its interest meets no constitutional test in this highly sensitive area of political freedom:

> "As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. . . . For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." *Kusper v. Pontikes*, 414 U.S. 51, 56.

That test, imposed by this Court in *Kusper*, has never been applied to this statute. It is a test that neither this statute nor the unhappy spawn of legislative experiments that it will inevitably sire, can ever pass. For each time a legislature dictates the makeup of a subordinate elective body it is necessarily and impermissibly denying the right of electors to vote freely for that elective body.

(2) *This Court has never approved voter-restriction statutes:* On but two occasions have statutes such as this one ever been before this Court. The first was *Blaikie v. Power,* 13 N.Y. Ed. 134, 193 N.E.2d 55 (1963), appeal dismissed at 375 U.S. 439 (1964). Here the City of New York attempted to replace its proportional representation statute with another ordinance aimed at insuring minority representation in the New York City Council. Examination of Judge Fuld's opinion in the New York Court of Appeals makes it quite clear that neither the First Amendment questions posed in *Hechinger* nor the Fifth Amendment inequity (in freeing independents from the voter-restriction found herein) were at issue before Judge Fuld or ruled on by him. The briefs on appeal to this Court are similarly devoid of any reference to either issue. The major issue before the Court of Appeals was that of violation of a special provision of the *New York* Constitution, a notion rejected by Judge Fuld in terms that simply do not apply herein.

In *LoFrisco v. Schaffer,* 341 F. Supp. 743 (D.C. Conn. 1972), aff'd, 409 U.S. 972, the trial court had before it a Connecticut voter-restriction statute. Again, the thrust of the argument before the three-judge Court and in briefs to this Court on appeal was that statute's violation of the one-man, one-vote apportionment principle. That is not the first, nor the second, but the third of the major arguments in *Hechinger.* The first two (First Amendment violations, and the unequal treatment accorded party voters under the Congressional statute) were not argued in *LoFrisco* nor ruled on below, nor argued in this Court.

It is appellants' position that the contested provisions of the D.C. Home Rule Act are a historic constitutional departure from existing First Amendment guarantees of voting rights, a departure than cannot be supported by what occurred in Courts below or before this Court in

either *Blaikie* or *LoFrisco.* If this Court wishes to issue a license to future legislative meddling with voting rights, it will be this Court's license, based on what is decided in *Hechinger.* On the basis of the clear written record, there simply is no way that this responsibility can be shared with the *LoFrisco* or *Blaikie* Courts below, or by this Court in its review of those Courts.

(3) *The remaining cases cited by the Court below are not precedent for what this Statute will do.* None of the remaining cases cited by the Court below supports this statute's departure from First Amendment guarantees previously recognized by this Court. *Buckley v. Valeo, Secretary of the Senate,* 44 LW 4127 (January 30, 1976), is quoted extensively below. It is a far cry from Congressional limitations on campaign expenditures, the subject of *Buckley,* to a flat prohibition against Democrats holding legislative office, the problem in *Hechinger.* Neither *Kaelin v. Warden,* 334 F. Supp. 602 (1971) and *People v. Carpentier,* 30 Ill. 2d 590, 198 N.E.2d 517 (1964) cited by the Court below[9a] came to this Court; *Carpentier* never got to a federal court. The language of *Gaffney v. Cummings,* 412 U.S. 735 (1973), cited by the Court below (slip opinion, p. 9-10), an apportionment case, provides its own distinction to *Hechinger.*

> "As we have indicated, for example, multi-member districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized" *Gaffney,* 412 U.S. at 754.

[9a] Slip opinion p. 6-7.

In *Hechinger*, the Democrats of the District of Columbia have been totally fenced out of the political process of electing half[10] of the at large Councilmen in the District of Columbia, a multi-member jurisdiction, and fenced out *as a matter of law*. In *Hechinger*, the Democrats of the District of Columbia have had their voting strength for these same elective posts cut from 76.55% to 50% *as a matter of law*.[11] That is the precise opposite of attempting to apportion Connecticut

> "to allocate political power to the parties in accordance with their voting strength and within quite tolerable limits," succeed[ing] in doing so" (*Gaffney*, at 754)

as this Court approved in *Gaffney*.

What this Court is asked to sanction has never been subject to the full briefing and intensive questioning justified by a new and dangerous legislative adventure. Full briefing of the constitutional issues and oral argument are certainly in order before this Court takes its leap into this new political thicket.

(4) *What this statute proposes is both impermissible and limitless in terms of legislative interference with guaranteed constitutional freedoms.*

(a) This incursion into legislative manipulation of voting rights is justified by the Court below in the following terms:

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10 Under Section 401(b)(2) and in the 1976 election; the denied access is to 40% of representatives elected at large under Section 401(d)(3).

11 *Ibid.*

> "We believe that Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capital is a valid one, sufficiently important to warrant the challenged interference with the rights of political association." (slip opinion, p. 5)

This assertion deals with a statutory prohibition imposed on District Democrats against their voting their political preference for half of the District Council's at large seats. Accordingly, this prohibition is favored with no presumptive constitutionality; and, as such, it must be tested narrowly. *Kramer v. Union School District, Kusper v. Pontikes, Dunn v. Blumstein, supra*, p. 10-11.

(b) The impropriety of this incursion by Congress is first evidenced by the absence of any rational limit to experimentation of this kind. Is Congress now free to legislate a *racial* balance in this same Council? If Congress can legitimately insure Republican membership in the District's legislature, can it insure white membership now, or black membership at some future date, or hispanic membership now or in the future? Is a *political* mix the only mix that is constitutionally blessed? What other balances are "sufficiently important"[12] to the legislative process? Is an *ethnic* balance in a City Council a proper subject for a legislature (*e.g.*, that of Illinois) to insure (*e.g.*, in the Chicago City Council).

It saves nothing for this Court to declare in *Hechinger* that insuring a political balance is constitutional, whereas a racial or ethnic balance must await adjudication, if and when it is proposed. What this Court is confronting in

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12 Opinion below, p. 5.

this case is legislative dictation to voters. It is the testing process of this constitutional novelty, as proposed below, *in this case* that is so troubling. Again, if the Illinois legislature were to legislate a 51% limit on Democratic membership in the Chicago City Council, is this to be tested solely by its *reasonableness*? Surely not, for if this is the test, then the Courts are catapulted full tilt into defining what is a reasonably minority and what is a reasonable majority in a local governing body. The Courts will be forced to decide the nuances of what is reasonable representation as a matter of law for a minority that cannot earn this representation at the polls. And among the unanswered questions posed by this test is whether but one party can invoke this reasonableness test, or can *all* minority parties, and if so, with what limit?

(c) If minority representation in local political affairs is the aim of this statute, is this nose of the Camel intruding in the right tent? For real minority give-and-take in our society is found not only between our parties, but within them. Certainly any political scientist observing the Washington scene in 1976 would be forced to observe that the array of views within the majority party is a major marketplace of ideas, and it is here that the experiment in legislating political vitality should be attempted. If the ruling below stands, the "reasonableness" test will lead to intro-party deliberations. Judicial intervention there is even less desirable.

(d) An essential element of the spectre before this Court is the unlimited opportunity for political manipulation and mischief that voter-restriction laws provide. If the political majority in a state legislature can legislate at will the makeup of county boards and city councils, the amount of political advantage open to that majority is immense. That political advantage is in no way lessened if it

is brought into being under a "minority representation" label. The federal courts, and ultimately this court, must then determine how much of the voter-restriction is pure aggrandizement at the town and country level for that majority party, and how much is legitimately based on minority representation.

In short each legislature (and thereby every federal court in review) will be required to offer its opinion as to what constitutes proper over-all representation for local voters, regardless of what those local voters, themselves, desire. This is an extension of legislative prerogative beyond permissible limits. Certainly this is no place for the Courts.

(e) What the Court below is proposing constitutes an open invtation for state legislatures to utilize voter-restriction laws to achieve results specifically prohibited by this Court's apportionment decisions. If Congress can disenfranchise 27% of the District's Democrats[13] in the District's at large races, this result can be repeated promiscuously by state legislatures seeking evasions of constitutional apportionment. All that is required is legislative action declaring that a certain number – or all – of county or town elective races must be run at large, and the imposition of a voter-restriction statute that prevents free choice by 15, 20 or 25% – or more – of the majority party in these elections. Reasonably equal apportionment is thus defeated under the guise of insuring minority representation. Under the lower Court's opinion the federal courts would inevitably be drawn into a series of confrontations, rendering decisions purely political in nature, an exercise far beyond this Court's proper province.

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[13] In the 1976 election and under Section 401(b)(2); the deprivation is 17% under Section 401(d)(3).

(f) This Court recently indicated most tellingly just where it believes virtue cannot practically or constitutionally be legislated in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). There this Court struck down Florida's statute guaranteeing a political candidate equal newspaper space in which to reply to political attack. The violation there was also of the First Amendment. The Court noted:

> (at 257) "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like other virtues it cannot be legislated."

These words apply equally to minority representation in local legislatures. If telling a newspaper what it must print violates the First Amendment, telling a Democratic voter he cannot vote for a Democrat to represent him in his local legislature is a violation no less egregious, capable of even greater constitutional mischief than that rejected by the Court in *Miami Herald*.

(g) Permitting a legislature to deny voters their franchise if it can justify the denial on general policy grounds is Russian roulette played with a basic constitutional freedom. The voters cannot win. An inevitable victim will be this Court and its business.[14]

Insuring active minority participation in local legislatures is a matter that has been turned over to the political arena in our country for 200 years. There, in the competition of ideas and at the ballot box, is where it belongs. It cannot be legislated.

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[14] That this policy is achieved by unreasonable means is discussed, *infra*, Section (c)(3), p. 20.

(C): The Fifth Amendment problems are unanswered by the Court below.

Appellants have urged that equal protection is denied them in two ways by the statute tested herein. First, it imposes a restriction against their selecting their preferred candidates for at large seats while imposing no similar restriction against independent voters. Second, because in allocating at large seats to Democrats, Congress, in its wisdom, has decreed that 50% shall be given the Democrats in contrast to the 76.55% of the electorate that is made up of Democrats.

(1) The opinion below makes it perfectly plain that in the view of that Court it is entirely constitutional to permit candidates of political parties to occupy only 50% of the at large seats on the D.C. Council whereas independent candidates may occupy all of them:

> "an independent candidate is exempted from the law's restrictions precisely because that person is *not* supported by an organization which is also supporting other candidates." (slip opinion, p. 11).

This distinction as to who may represent voters in the District of Columbia eludes precedent, any rationale yet articulated by Congress, and common sense. If Congress wished to encourage independent candidacy in the District there are a thousand constitutional ways to do so. Limitation on party expenditures is one. Requiring party candidates to endure the effort and expense of a primary, and permitting independents to go directly by petition to the final ballot is another: a restriction that is in present law, aggravating in practice the constitutional inequity. What Congress has ordained here is that independents in the District of Columbia are entitled to twice the representation

given to Republicans, Democrats or Statehood Party supporters; That rule is fixed and is without reference to what happens in any or all of the ward races.

It is unprecedented to grant one party, as a matter of law, twice the representation of another in an elected body. It is unprecedented to grant one form of political belief double the legislative power of another in advance and as a matter of law. This void is just as empty when the beneficiary of this preferential treatment is independent belief, which, of course, is just as surely political as is partisan belief.[15]

The reason that this is nowhere found – except in the District of Columbia under this enactment – is that it is grossly discriminatory and unrelated to any form of legitimate encouragement or subsidy which independent political thinking can possibly claim. It is gross paternalism; the whim of legislators in 1974 as to who should more beneficially represent the people.

(2) The Court below had no answer for, nor did it treat, the contention made by appellants that Democrats within the District of Columbia are denied equal protection of the law in an apportionment sense because Congress

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15 Not alone unprecedented but proscribed: "Further" (for invalidity of a multi-member apportionment scheme)" there must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. There must be evidence that the group has been denied access to the political process equal to the access of other groups." *Chapman v. Meier*, 420 U.S. 1, 17, citing White v. Regester, 412 U.S. at 765, 766. It is simply unreasonable to discriminate against Democrats, Republicans and Statehood Party supporters because of their beliefs.

has allocated to them no more than 50% representation[16] in the at large seats on the D.C. Council, in contrast to the 76.55% that Democrats comprise of the registered voters in the District. This apportionment is, as noted earlier, wholly without regard to what occurs in the eight ward races for the Council.

(3) The "reasonableness" of this restriction arises in another context as a result of the lower court's opinion. After determining that Congress' insuring minority representation in the D.C. Council justified the first amendment restrictions caused thereby, the Court held that the:

> "means adopted to promote that interest are reasonable and do not amount to an unnecessary abridgment of those" (First Amendment "rights.") (slip opinion, p. 5).

Those "means", examined closely, are the inflation of minority voting strength in the District from 23.45% of those registered to vote, to 50% of the at large seats in the Council which must, as a matter of law, be filled by that 23.45% of the electorate. The reciprocal of this is the restriction of 76.55% of the electorate to but 50% of the at large seats on the Council. This artificial inflation of minority strength and equally artifical restriction on the majority party is wholly independent of what occur in any of the other eight ward races for Council.

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16 Under 401(b)(2) and in the 1976 election; No more than 60% representation is representatives chosen at large is prescribed by 401 (d)(3).

Those members hardly reflect a "reasonable" means of attaining a legislative goal. Malapportionment of this dimension would violate this Court's apportionment rules. This malapportionment is no more reasonable if imposed under the new label of a voter-restriction statute.

CONCLUSION

A desirable political climate, one in which there exists a maximum of citizen participation, is a goal universally desired. But like many such goals, it is a subtle and slow-growing bloom, to be nurtured over time by unceasing public watchfulness, growing voter awareness and lively issues. None of these forces can be legislated into being. It is logical that an attempt to legislate into existence the ultimate goal of this, civic participation, constitutes tampering.

Tampering it is. Where legislatures tell voters which political party they may vote for and which not – an historic first for any legislature – it is tampering. And because tampering leads to more tampering, it is dangerous activity for any legislature, forbidden by the plain guarantees against state interference with the free exercise of the political franchise which are gospel in this Court in 1976.

Of equal concern is the new role this tampering would force on this Court, which must now play the Supreme Being of political wisdom, dictating to the voting public elected representatives they plainly do not want. This novel judicial role is light years removed from insuring the right to vote or other basic freedoms. It requires this Court, joining with legislatures, to exercise superior political wisdom in place of 10%, 15%, or as much as 49% of the electorate. This is not a judicial function.

Before this Court takes this function on, it should minimally, order full briefing and argument in this cause. Then, upon full scrutiny, this statute should be enjoined as an unwanted invasion of each voter's political conscience and a clear discrimination against partisan belief.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN W. HECHINGER, et al., Plaintiffs,	:	
v.	:	Civil Action No. 74-1666
ROBERT MARTIN, Chairman, District of Columbia Board of Elections and Ethics, et al., Defendants.	:	

MEMORANDUM AND ORDER

This case is now before the Court on Plaintiffs' Motion For Summary Judgment And For Entry of Permanent Injunction, Defendants' Cross-Motion For Summary Judgment, and the Joint Cross-Motion of Intervenors For Summary Judgment. For the reasons explained herein, plaintiffs' motion is denied, and summary judgment is granted for defendants.

Background

The facts of this case are not in dispute. Plaintiffs Hechinger, Huff, Lewis, Dulcan and Berenson are affiliated Democrats in the District of Columbia. Plaintiff Democratic Central Committee is the District of Columbia's local Democratic party organization. Intervenor Republican Committee is the District of Columbia's local Republican organization. Intervenor Jerry A. Moore, Jr., is an affiliated Republican who was elected on November 5, 1975 to one of four at-large seats on the District of Columbia Council. Intervenor Rich is an unaffiliated voter who was defeated in his bid for one of the four at-large

seats on the Council in the election of November 5, 1975. Defendants Martin and Chapman are chairperson and member respectively on the District of Columbia Board of Elections and Ethics.

Plaintiffs in this case seek a judgment declaring Sections 401(b)(2)[1] and 401(d)(3)[2] of the District of Columbia Self-Government and Governmental Reorganization Act[3] unconstitutional and enjoining the defendant Board from enforcing those limitations. In an earlier action,[4] in which plaintiffs sought similar relief immediately prior to the 1974 election, the Court held that the action should be dismissed, without prejudice to refiling, because it was then too close to that election for the Court to take responsible action. The present action is substantially the same as the earlier action, as permitted by that decision.

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[1] Section 401(b)(2) reads:

> In the case of the first election held for office of member of the Council after the effective date of this title, not more than two of the at-large members (excluding the Chairman) shall be nominated by the same political party. Thereafter, a political party may nominate a number of candidates for the office of at-large member of the Council equal to one less than the total number of at-large members (excluding the Chairman) to be elected in such election.

[2] Section 401(d)(3) reads:

> Notwithstanding any other provision of this section, at no time shall there be more than three members (including the Chairman) serving at large on the Council who are affiliated with the same political party.

[3] P.L. 93-198, 93rd Cong., 87 Stat. 744 (1973).

[4] *Dulcan v. Martin*, CA 74-1498, Decided October 18, 1974.

The District of Columbia Self-Government and Governmental Reorganization Act provides for the election of a Council for the District of Columbia to act as the District's legislature. The Council is made up of thirteen members. Eight are elected from wards, four are elected at-large, and one is elected at-large separately as chairperson of the Council. The purpose of the limitations contained in the sections at issue is to ensure minority representation on the Council (As of March, 1975, 76.55% of the District's qualified voters had affiliated with the Democratic party). The act was signed by The President on December 24, 1973. On May 7, 1974, pursuant to its provisions, the Act was submitted to the voters of the District and was approved by a majority of 82.74% of the vote case. As a result of the November 5, 1974 election, Democrats were elected to all eight ward seats on the Council, to two of the at-large seats, and to the chair of the Council, for a total of 84.6% of the votes on the Council. Plaintiffs now seek to have the Court invalidate Sections 401(b)(2) and 401(d)(3) of the Act on First and Fifth Amendment grounds.

First Amendment

Plaintiffs claim that the statute deprives them of First Amendment rights in two respects. In the first place, it prevents plaintiffs as registered Democrats from exercising their vote in accordance with their political beliefs in the election of at-large councilmen on the District of Columbia City Council. Additionally, according to plaintiffs, the statute prevents them from free and effective association with other Democrats in political activity aimed at electing Democrats to the at-large seats on the Council. Intervenor's version of the question presented by plaintiffs' claims is well stated, i.e. that plaintiffs' claims in this regard present the question whether the Constitution requires

that the political party with the majority of registered voters must have the right in an election for a multi-member body to elect all the members of that body.

We have examined all the authorities cited by plaintiffs in support of their position, and are unable to discern any such requirement. On the contrary, it appears that the minority representation provision is more compatible with the First Amendment than plaintiffs' requirement would be.

No one serious contests the fundamental nature of the rights claimed by plaintiffs under the First Amendment, and the Supreme Court has in fact articulated the concept on many occasions – most recently in *Buckley, et al. v. Valeo, Secretary of the United States Senate, et al.* 44 LW 4127 (January 30, 1976).

But this latest expression from the Supreme Court appears to meet in a somewhat head-on fashion all of plaintiffs' claims in this regard.

> "The Court's decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom' that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.' Kusper v. Pontikes, 414 U.S., at 57; Shelton v. Tucker, 364 U.S. 479, 486 (1960). See, e.g. Bates v. Little Rock, 361 U.S. 516, 522-523 (1960); NAACP v. Alabama, 357 U.S., at 460-461; NAACP v. Button, 371 U.S., at 452 (Harlan, J., dissenting). In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' NAACP

> v. Alabama, supra, at 460-461. Yet, it is clear that '[n]either the right to associate nor the right to participate in political activities is absolute.' Civil Service Comm'n. v. Letter Carriers, 413 U.S. 548, 567 (1973). Even a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. Cousins v. Wigoda, 419 U.S., at 488; NAACP v. Button, supra, at 438; Shelton v. Tucker, supra, at 488."

44 U.S. LW at 4134.

We think that the Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capitol is a valid one, sufficiently important to warrant the challenged interference with the rights of political association, and that the means adopted to promote that interest are reasonable and do not amount to an unnecessary abridgment of those rights.

But for the restriction of the challenged sections the majority party (Democratic at present) would be able to elect all of its candidates to the council, thus leaving a minority without any input into council activity. The concept of minority representation, or stated in another fashion, limitations on majority representation, is entirely consistent with First Amendment principles of freedom of expression and association, and appears altogether legitimate as a legislative objective. Various schemes for accomplishing the purpose of such legislation, including measures identical, or nearly so, to the sections here challenged have been examined in the light of constitutional standards and declared to be valid.

In *Kaelin v. Warden*, 334 F.Supp. 602 (E.D. Pa. 1971) Pennsylvania adopted a scheme known as limited voting in an effort to encourage what the Court described as ". . . a fairer or more effective representation that would otherwise result if a simple plurality rule were used in which the majority elects all the commissioners, for this would necessarily discriminate by entirely discounting the votes of the minority electors". In an election for a board of three commissioners each elector could vote for no more than two persons. The three having the highest number of votes were elected. The Court characterized the purpose as a "legitimate political goal", and the limited voting scheme an "acceptable method" to accomplish it.

Illinois' minority representation effort limits each party's nominations for 177 seats in the State House of Representatives to 188. A constitutional attack on the statute was rejected by the state's highest court, which observed ". . . minority representation in the House is a principle firmly entrenched in the Demoncratic traditions and ideologies of this state". *People v. Carpentier*, 30 Ill. 2d 590, 198 NE 2d 517 (1964).

Assurance of some minority representation on the city council was the objective of a provision of the New York City charter which combined the features of limited voting by the individual elector along with a limitation on the number of candidates of any particular political party. The council was to consist of a single member elected from each ward in the city in addition to ten at-large members – two elected from each of five boroughs. Political parties were restricted to nominating only one candaidate for the at-large seats in each borough, and each elector could vote for only one boroughwide candidate. A provision for some minority representation in a multiple body

was recognized as a laudatory legislative endeavor by Judge Fuld in an opinion rejecting an attack on the charter provision on constitutional grounds. *Blaike v. Power*, 13 N.Y. Ed. 134, 193 N.E.2nd 55 (1963), *Appeal dismissed for want of a substantial federal question*, 375 U.S. 439 (1964). He stated that "such representation can play an important role in a democracy", and cited the language of an earlier decision of his court which characterized the concept (minority representation) as "an attempt to make representative government a reality" (*Johnson v. City of New York*, 274 N.Y. 411, 430, 9 N.E. 2nd 30, 38).

A Connecticut minority representation statute similar to the one in *Blaike, supra*, limits the number of candidates a political party can nominate for vacancies on multi-member boards, commissions, etc., and also the number for whom an elector can vote. In *Lo Frisco v. Schaffer*, 341 F. Supp. 743 (D. Conn. 1972) a unanimous three-judge district court, in turning away a constitutional attack on the restrictions, agreed with the legislature that it was "important, on boards . . . to have a significant minority voice, to air and introduce ideas which the majority might not otherwise consider"' and observed that "the statute was not meant to wrest power and control from the majority, but to assure intelligent decision-making". (*Id.* at 750)

In *Gaffney v. Cummings*, 412 U.S. 735 (1973) the Supreme Court recognized a so-called "political fairness principle" in the allocation of party strength when it approved a districting scheme in Connecticut designed "to produce a different – a more 'politically fair' – result than would be reached with elections at large in which the winning party would take 100% of the legislative seats . . ." Implementation of this policy of political

fairness was recognized as a sufficient basis for allowing some deviation from absolute population equality among voting district contemplated by the one man-one vote concept. Obviously this same policy of political fairness prompted the Congress to impose the restrictions here challenged. Indeed, the chairman of the House District Committee articulated such a rationale when he stated that the scheme constituted a fair and equitable protection of minority interests.

Plaintiffs' suggestion that the Supreme Court overlooked, or otherwise somehow missed, the glaring, constitutional infirmities present in both *Blaike* and *Lo Frisco* is unpersuasive. We believe it is more likely that those infirmities, so apparent to plaintiffs, were not discernible to the Court not because of any oversight, but because they in fact do not exist, and that the Court left *Blaike* and *Lo Frisco* intact for the same reasons which prompted it to conclude in *Gaffney v. Cummings, supra,* at 754:

> What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment. As we have indicated, for example, multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized. See White v. Regester, supra; Whitcomb v. Chavis, supra. See also Gomillion v. Lightfoot, supra. Beyond this, we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States. Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and within

> quite tolerable limits, succeeds in doing so. There is no doubt that there may be other reapportionment plans for Connecticut that would have different political consequences and that would also be constitutional. Perhaps any of appellees' plans would have fallen into this category, as would the court's had it propounded one. But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

It is true, as plaintiffs point out, that *Gaffney* is an apportionment case; we think however that the broad policy considerations articulated in the quoted language apply with equal force to the instant case. The election law here at issue does not fence any grupo out; its purpose and effect is to ensure that political minorities are represented on the Council and that dissident voices are heard in the legislative process. In the view of the Court, the purpose of the legislation is entirely harmonious with that of the First Amendment, and the means chose to further that purpose are well within constitutional imits.

Fifth Amendment

The gist of plaintiffs' Fifth Amendment claims is that the law unconstitutionally discriminates against all political parties by allowing independent candidates to be elected to all four at-large seats while restricting candidates of any party to holding two of the four seats. Plaintiffs cite *Blaike v. Power, supra,* as a basis for their contentions,

arguing that the New York statute involved applied to both parties and independent bodies, and therefore did not discriminate in favor of independents as the District of Columbia statute allegedly does.

Plaintiffs fundamentally misunderstand the concepts involved. The New York law prohibited any group, whether it met the qualifications for a political party or not, from holding more than one seat per borough. Likewise, the D. C. law prohibits any group from holding more than two at-large seats on the Council. Plaintiffs somehow equate the phrase "independent organization" in the New York context. The two are distinct, because under the D. C. law a New York "independent organization" would be covered as a political party. 1 D.C. Code § 1121(j). The plaintiffs further fail to recognize that an independent candidate is exempted from the law's restrictions precisely because that person is *not* supported by an organization which is also supporting other candaidates. The entire purpose of the restriction is to prevent one organization's candidates from capturing more than two at-large seats on the Council; that danger does not exist, by definition, with independent candidates, since they are not related organizationally to any other candidates running. "Independent candidates" is not a party or organizational label, it is a label of, for want of a more appropriate word, independence. No discrimination or Fifth Amendment problem is apparent to the Court on this scheme.

Accordingly, it is by the Court this 24th day of March, 1976,

ORDERED, that plaintiffs' motion be, and hereby is, denied; and

FURTHER ORDERED, that the cross-motions of intervenors and defendants be, and hereby are, granted.

/s/ J. Skelly Wright
United States Circuit Judge

/s/ William B. Bryant
United States District Judge

/s/ John H. Pratt
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN W. HECHINGER, et al.,
Plaintiffs,

v.

ROBERT MARTIN, Chairman
District of Columbia Board
of Elections and Ethics, et al.,
Defendants.

Civil Action
No. 74-1666

JUDGMENT

Pursuant to the Memorandum and Order attached hereto, judgment in the above-captioned case is hereby entered in favor of the intervenors and the defendants.

/s/ J. Skelly Wright,
United States Circuit Judge

/s/ William B. Bryant
United States District Judge

/s/ John H. Pratt
United States District Judge

Dated: March 24, 1976